



Legal Update

January 2016

The Appeals Court holds that police were justified in searching a motor vehicle under the inevitable discovery exception!

Commonwealth v. Michael Ubeliz, Mass. Appeals Court, No. 14-P-1108 (2016):

This case serves as a good review of the inevitable discovery exception as well as addressing the issue of whether a misdemeanor, not included in the provisions of G.L. c. 90, § 21, is arrestable pursuant to common law.

The case also addresses the parameters of search incident to arrest. If a driver is outside of a motor vehicle, handcuffed and having no access to the vehicle, searching a motor vehicle for weapons would likely not stand. Also, where there is no reason to believe that evidence of the offense would be found inside the vehicle, a search would be unlawful.

Background: On January 7, 2010, Burlington Officer Peter Abaskharoun received a report that two suspects had left the Wendy's parking lot in a van with the victim's cell phone that they had stolen. The victim used her Global Positioning System (GPS) tracker to locate her cellphone from Woburn to Burlington and obtained the license plate of the car.

Upon receiving the information from dispatch, Officer Abaskharoun ran the license plate and learned that the registration of the motor vehicle the victim described was revoked. Officer Abaskharoun observed the vehicle pass him proceeded to conduct a 'felony stop' of the car with his gun directed at the van. The defendant Peter Ubeliz, (hereinafter referred to as "the defendant") exited the vehicle and complied with Officer Abaskharoun's orders. Although Officer Abaskharoun did not recover any weapons from the defendant after he conducted a patfrisk, he did observe inside the vehicle "two purses in plain view." Both the defendant and the passenger were males and the purse that Officer Abaskharoun could see in the rear seat of the motor vehicle matched the victim's description of her purse.

During a further search of the vehicle, Officer Abaskharoun recovered a tan purse containing a female's identification behind the driver's seat, laptops, GPS units, cellphones and tools to punch out a car window pane including a screw driver. Since there were too many items to inventory, the vehicle was towed to the Burlington Police Department where an inventory search was conducted in accordance with the Burlington Police Department's Inventory Policy. The victim did identify her purse and the defendant was ultimately convicted of two counts of receiving stolen property having a value greater than \$250, G. L. c. 266, § 60; and one count each of possession of a burglarious instrument, G. L. c. 266, § 49; receiving a stolen credit card, G. L. c. 266, § 37B(b); improper use of a credit card, G. L. c. 266, § 37B(f); forgery of a document, G. L. c. 267, § 1; uttering a false writing, G. L.c. 267, § 5; and operating a motor vehicle with a suspended registration, G. L. c. 90, § 23.

The defendant filed an appeal and argued that (1) because the police did not have probable cause to believe he had committed a crime when he was arrested, the search incident to arrest was invalid and (2) the inevitable discovery exception does not apply in this case.

Conclusion: The Appeals Court affirmed the convictions and concluded that the inevitable discovery exception applied. The Court did not address whether the searching the motor vehicle was valid as a search incident to arrest.

1st Issue: Does the inevitable discovery doctrine apply?

The Court held that the inevitable discovery doctrine applied in the underlying case by relying on the **two step analysis** that was established in *Commonwealth v. O'Connor*, 406 Mass. 112, 117 (1989).

- In the **first step** of the *O'Connor* analysis, the Commonwealth has the burden of proving the facts bearing on inevitability by a preponderance of the evidence and, once the relevant facts have been proved, that discovery by lawful means was certain as a practical matter.

- In the **second step**, the court considers the severity of the alleged constitutional violation. In this regard, "[b]ad faith of the police, shown by such activities as conducting an unlawful search in order to accelerate discovery of the evidence, will be relevant in assessing the severity of any constitutional violation." *O'Connor, supra* at 118.

With regard to the **first step**, the Court determined that the purses and other stolen items would have been discovered as a practical matter. There was no dispute that the police had sufficient ground to stop the defendant's van based on the officer's knowledge that the van's registration was revoked. Inevitability is determined by the "circumstances existing at the time of the unlawful seizure." *O'Connor, supra* at 117. Here, Officer Abaskharoun knew before he stopped the van that the registration was revoked. Pursuant to G. L. c. 90, § 9, an unregistered vehicle cannot be operated, nor can it be allowed to remain on any way. The statute specifically states:

No person shall operate, push, draw or tow any motor vehicle or trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated, pushed, drawn or towed upon or to remain upon any way . . . , unless such vehicle is registered in accordance with this chapter. G. L. c. 90, § 9.

The van had to be impounded as a "practical matter" because the revoked registration prevented the defendant from operating the motor vehicle. Second, the van could not be left on the side of the road because it was stopped on a busy roadway. Based on the facts in this case, the Court found that the first prong of the inevitable discovery analysis in *O'Connor* was satisfied. Also, the defendant never raised any challenges regarding the procedure for inventorying the vehicle.

The **second step** of the *O'Connor* analysis examines whether the police were acting in bad faith to discover evidence which would result in a constitutional violation. *Commonwealth v. Perrot*, 407 Mass. 539, 547 (1990). The defendant argued the second prong was not satisfied because the police used excessive force when they stopped his van and ordered him out of the vehicle with their guns drawn. Even after accepting the defendant's claim that the officers' use of force was excessive, the Court found that the police were not trying to circumvent the warrant requirement nor were they acting in bad faith. After considering all the facts, the Court found that the second prong of the *O'Connor* analysis was satisfied and therefore the evidence recovered from the vehicle was lawful under the inevitable discovery exception.

2nd Issue: Could police have searched the motor vehicle pursuant to search incident to arrest and could a misdemeanor of operating a motor vehicle with a suspended registration be arrestable?

Although the Court upheld the defendant's convictions under the theory of inevitable discovery, it offered some guidance as to whether a charge of operating a motor vehicle with a revoked registration in violation of G.L. c. 90, § 23, could be an arrestable offense. In the circumstances where it is arrestable, the Court considered whether the police could have searched the motor vehicle as a search incident to arrest.

The Court first analyzed whether a search incident to arrest would have been lawful based on the operating a motor vehicle with a revoked or suspended registration. There is no statutory right of arrest for the above charge because it is a misdemeanor. However, a police officer can make a warrantless arrest for a misdemeanor only where it:

- (1) involves a breach of peace,
- (2) is committed in the presence or view of the officer, and
- (3) is still continuing at the time of the arrest or only interrupted so that the offense and the arrest form parts of one transaction."

Commonwealth v. Gorman, 288 Mass. 294 (1934). Based on the facts of this case, there was no indication that the defendant was committing a breach of peace by the way he was driving or had any other disturbing effect on the public.

Aside from the absence of a breach of peace, there are two additional reasons why the police would not have been justified in searching the motor vehicle as a search incident to arrest.

"The purpose of a search incident to arrest is [1] to prevent an individual from destroying or concealing evidence of a crime for which police have probable cause to arrest or [2] to prevent an individual from gaining access to weapon to resist arrest or escape." *Commonwealth v. Santiago*, 410 Mass. 737, 743 (1991).

First, the defendant was handcuffed and kneeling outside the van. There was no possibility that the defendant was in reaching distance of the evidence or a weapon. **Second**, the officer could not have reasonably believed that the evidence of the offense of operating a motor vehicle with a revoked registration would have been found in the van. Based on the above factors, a search of the defendant's motor vehicle would not have been lawful as a search incident to arrest because the offense was not arrestable, the defendant was not in reach of the vehicle and there was no reason to believe evidence of the offense would have been recovered from the van.